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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RANDALL GHIBAUDY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented For Review

I. Whether Due Process And Fundamental Fairness Mandate That The Government Be Prohibited From Compelling Testimony From This Petitioner Because The Government Freely Admits It Plans On Indicting The Petitioner And The Government Refuses To Place All Of Its Evidence Against The Petitioner Under Seal.

II. Whether Petitioner, Prior To Testifying Before A Grand Jury, Has The Right To Receive Evidence Of Any Electronic Surveillance Of Himself Or His Attorney As Mandated By Gelbard v. United States, 408 U.S. 41 (1972).

III. Whether The Petitioner Was Deprived Of Due Process In That He Was Not Given A Contempt Hearing And Thus Was Denied A Meaningful Opportunity To Prepare A Defense.

List of Parties to the Proceeding

Randall Ghibaudy - Petitioner

United States of America - Respondent

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Official Report of the Case

The United States Court of Appeals for the Seventh Circuit, as of the date of the preparation of this brief, has not issued an opinion.

Grounds Upon Which the Jurisdiction of the Supreme Court is Invoked

The United Sttes Court of Appeals for the Seventh Circuit issued an order on November 9, 1984 affirming the order of the District Court for the Central District of Illinois, civil contempt and incarceration. The jurisdiction of this Honorable Court is hereby invoked pursuant to Title 28, United States Code §§ 1254(1), 2101(c) and Rule 20 of the Rules of the Supreme Court of the United States.

Constitutional Provisions and Rules Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; or shall private property be taken for public use, without just compensation.

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Now comes the Petitioner, Randall Ghibaudy, by and through his counsel, and respectfully prays this Honorable Court to issue a Writ of Certiorari, to the United States Court of Appeals for the Seventh Circuit, to review the judgement entered therein.

Statement of Facts

On or about July 25, 1984, Randall Ghibaudy was subpoenaed to appear before a grand jury sitting in Springfield, Illinois within the Central District of Illinois. Counsel for Petitioner called Assistant United States Attorney Francis Hulin and requested a three day continuance as he was involved in taking the Florida Bar Examination on that day in Orlando, Florida. Mrs. Hulin refused to agree to the short continuance requested and further stated that she had requested authority to immunize Mr. Ghibaudy should he choose not to testify and that the immunity notwithstanding, she still intended to seek an indictment against Mr. Ghibaudy arising from the very matters about which his testimony pertained.

Mr. Ghibaudy had been subpoenaed to appear before a grand jury sitting in this

same district over a year earlier but no action had been taken by the government at that time.

Mr. Ghibaudy had been subpoenaed to appear before a grand jury sitting in this same district over a year earlier but no action had been taken by the government at that time.

Mr. Ghibaudy appeared as he had been commanded to do with an associate of Mr. Pritzker. Mr. Ghibaudy's appearance before the grand jury was nonetheless continued at the request of Mrs. Hulin as she was ill. Mr. Ghibaudy's subpoena was continued to August 23, 1984.

Prior to August 23, 1984, counsel for Petitioner and Mrs. Hulin again discussed possible settlement of the grand jury issues including the possibility of the government voluntarily providing certain discovery. Some discovery was voluntarily provided and

some refused. But Mrs. Hulin again reiterated that she would still seek Mr. Ghibaudy's indictment even if he fully testified in conformity with his subpoena.

Mrs. Hulin also testified that she expected that the evidence would show that a few years ago Mr. Ghibaudy was involved in the distribution of marijuana on two occasions in approximately 1980 and that she believed that she knew from whom the marijuana was received and perhaps even to whom distributed.

On July 17, 1984 the United States Attorney sought and received an ex parte order from the Honorable Judge Harold Baker which provided in pertinent part:

"This order shall become effective only if after the date of this order that said Randall Ghibaudy refuses to testify or provide other information on the basis of his privilege against self-incrimination."

On August 23, 1984, Petitioner filed certain motions seeking discovery and other relief from the Court relating to his testimony. Said motions were not considered by the Court until after Mr. Ghibaudy's alleged recalcitrant behavior. They were summarily denied.

Mr. Ghibaudy was taken before the grand jury and although he generally answered questions propounded to him he subsequently refused to answer certain questions. Thereafter, Mr. Ghibaudy was brought before the trial court and summarily incarcerated for contempt.

While before the Court, Counsel for Petitioner requested a few days to prepare a defense to the alleged contempt and that an evidentiary hearing be held. Further, counsel for Mr. Ghibaudy advised the Court that as Judge Baker's order was not effective in the absence of a triggering condition prece-

dant, the Court should now advise Mr. Ghibaudy that the prior ex parte order of immunity was now in force and that refusal to respond could constitute contumacious conduct. Counsel for Petitioner stated that Mr. Ghibaudy's defense was hardly frivolous. He advised the grand jury and had attempted to advise the Court that he was also relying on privileges and rights other than the Fifth Amendment to support his position and that therefore mere protection from Fifth Amendment violations would not be as broad as the scope of the intrusion. The grand jury did not ask and the Court refused to hear any defense by Mr. Ghibaudy to his purported refusal to testify. Those motions were summarily denied.

The court ordered Mr. Ghibaudy incarcerated. Counsel for Petitioner requested the court to consider a stay of execution of the sentence and to consider the personal

background and individual character of Mr. Ghibaudy in that he is married with a good job and has two small daughters ages two and five. Said motions were denied and Petitioner was incarcerated immediately on August 23, 1984. Petitioner filed a timely Notice of Appeal. On October 10, 1984, Petitioner filed his Brief in the United States Court of Appeals for the Seventh Circuit and a Motion for Release Pending Appeal. On November 9, 1984, the Court of Appeals for the Seventh Circuit heard Oral Argument and thereupon issued an order affirming the District Court. As of this date, no opinion has been filed.

Reasons for Allowing the Writ

I. Due Process And Fundamental Fairness Mandate That The Government Be Prohibited From Compelling Testimony From This Petitioner Because The Government Freely Admits It Plans On Indicting The Petitioner And The Government Refuses To Place All Of Its Evidence Against The Petitioner Under Seal.

In the case at bar, counsel for Mr. Ghibaudy was repeatedly told that the Petitioner was a target of the Grand Jury and that the United States Attorney, after Petitioner's testimony, planned to seek an indictment against him. Such actions were not disputed at Oral Argument.

The government's ability to obtain pretrial discovery is a function of Rule 16 of the Federal Rules of Criminal Procedure, and it may not be enlarged through conversion of the grand jury, an arm of the judiciary, into a tool of the executive branch. Use of

the grand jury by prosecutors for criminal discovery is particularly unfair and violative of due process in the absence of a corresponding discovery mechanism for the Defendant. Wardius v. Oregon, 412 U.S. 470 (1973).

The sole purpose of calling Mr. Ghibaudy to testify in front of the Grand Jury was to induce contempt or perjury. He was a target whom they had information about and whom they intended to indict. Petitioner filed in the District Court, a Motion and Memorandum for Protective Order and Disclosure, which requested the District Court Judge to require the government to set forth, under seal, all the independent evidence which was in their possession prior to any compelled testimony by Mr. Ghibaudy. The District Court denied said Motion stating it was frivolous. Such a procedure has been done in other Circuits and protects the

integrity of the judicial process and also prevents any exploitation and use of compelled testimony by the government in violation of Title 18 USC §6002. Goldberg v. United States, 472 F.2d 513 (2nd Cir. 1973); Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L.J. 171 (1972).

The Petitioner in the instant case also has made prior statements to various agents of the Federal Government and required such discovery of the statements before being held in contempt. The government refused to provide the statements and the District Court denied any production at all. Such discovery refusal violates fundamental fairness and due process. Bursey v. United States, 466 F.2d 1059, 1980 (9th Cir. 1972). Mr. Ghibaudy has made statements over a period of approximately two years to various agents. Even though granted immuni-

ty, Petitioner is still liable to be prosecuted for perjury. The potential for abuse in the instant case is considerable and is further exacerbated by the government's bad faith.

The government knew that Mr. Ghibaudy would not testify voluntarily and by refusing discovery, sought to induce perjury viz a viz any prior inconsistent statements. That is an abuse of the grand jury process and the District Court, in its supervisory role over the grand jury, can and should protect the constitutional rights of all witnesses. United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978).

Due process and fundamental fairness require that Mr. Ghibaudy not be compelled to testify before the Grand Jury. The government freely admits that it will indict Mr. Ghibaudy. Mr. Ghibaudy is not like the

ordinary witness whose Grand Jury testimony can aid the government in an ongoing investigation, while not being a government's target. In reality, Mr. Ghibaudy is quite the opposite: he is himself the target of the government's investigation. The same jurisdiction seeking to compel Mr. Ghibaudy to testify is the very same jurisdiction which intends to prosecute Mr. Ghibaudy.

The government ignored the conditional nature of Judge Baker's order which did not confer immunity immediately but only after Mr. Ghibaudy had refused to testify. Judge Ackerman having ruled, without any evidence, that Mr. Ghibaudy had refused to testify should have advised Mr. Ghibaudy that Judge Baker's order was now effective and he could no longer refuse to testify relying upon the Fifth Amendment. Denied a meaningful hearing, Mr. Ghibaudy was precluded from advancing his theory of other rights and

privileges which also protected him from the requirement of testifying, and from establishing whether or not the questions for which he was held in contempt, were both material and relevant and therefore were required to be answered. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

The dangerous situation that Mr. Ghibaudy finds himself in is a situation prohibited by the Fifth Amendment. The government is trying to vitiate the constitutional protection against self-incrimination by compelling Mr. Ghibaudy to be a witness against himself, all the while they are planning to indict him. Mr. Ghibaudy requests that this Honorable Court protect his constitutional right of freedom from self-incrimination.

The government relied on cases from other jurisdictions, which it claims supports

its position, such as In Re Bianchi, 542 F.2d 98 (1st Cir. 1976); In Re Grand Jury Proceedings: Appeal of Greentree, 644 F.2d 348 (5th Cir. 1981). However, in none of these cases were the various defendants who were compelled to testify against themselves the government's target. They were not at the same risk as Mr. Ghibaudy. The government cannot rely on these cases as justification for compelling Mr. Ghibaudy to testify.

Before the Appellate court, the Government graciously "accepted" the principle set forth in Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed. 2d 212 (1972), that in a subsequent criminal prosecution of a person who has been compelled to testify under a grant of immunity, the prosecutor has the burden of proving affirmatively that the evidence used is derived from a legitimate source wholly independent

of the compelled testimony. The government even acknowledges that this burden is a heavy one. The government's burden goes beyond the mere negation of taint: once the defendant demonstrates he has testified under immunity, the government must prove that the evidence it proposes to use is wholly independent and legitimate.

In order to help satisfy this heavy burden, the government should set forth under seal all of the independent evidence which it possesses against Mr. Ghibaudy. Placing this independent evidence under seal would go further to protect Mr. Ghibaudy's Fifth Amendment privilege against self-incrimination than he is currently afforded by the Government. Moreover, placing this evidence (or, at least, copies of this evidence) under seal would aid the government in meeting this onerous burden of proof once they indict Mr. Ghibaudy. Finally

placing the evidence under seal is in the best interests of judicial economy, as whatever evidence is placed under seal will not be litigated. Placing this evidence under seal is the only way to satisfy the burden imposed by Kastigar; further, doing so is beneficial to all of the parties concerned, and detrimental to none of them.

The government, in its brief, refused to set the evidence under seal. If the government intends to prosecute Mr. Ghibaudy using only that evidence which is legitimate and wholly independent, and, if they plan on meeting the heavy burden imposed by Kastigar, then the government should agree to place all of its evidence under seal. Yet, the government strenuously refuses to do so. Mr. Ghibaudy seriously questions the good faith of the government in this matter, and justifiably fears that any compelled testimony of his would be inextricably

connected to the government's evidence against him, and that the government, in truth, has no independent evidence.

Because the same jurisdiction which compels Mr. Ghibaudy to testify against himself also plans to indict him, and because the government refuses to place its independent evidence against Mr. Ghibaudy under seal to insure protection of his Fifth Amendment privilege against self-incrimination, Due Process and Fundamental Fairness prohibit Mr. Ghibaudy from being compelled to testify.

II. The Petitioner, Prior To Testifying Before A Grand Jury Has The Right To Receive Evidence Of Any Electronic Surveillance Of Himself Or His Attorney.

The compulsion order issued on August 23, 1984 by the District Court was improper and thus Petitioner was not required to answer the questions propounded by the Assistant United States Attorney. The District Court at first denied Mr. Ghibaudy's Motion for Disclosure of Electronic Surveillance on himself and in regard to his counsel. This denial was clearly erroneous in light of the fact that the Motion that was filed stated possible evidence of intercepted communications. The Court then asked the Assistant United States Attorney who was in court on August 23, 1984 and who was not Mrs. Hulin, if there was any electronic surveillance of Mr. Ghibaudy. The Assistant United States Attorney, without querving any federal agencies or other fed-

eral districts in which this investigation was pending, simply orally denied any surveillance, legal or illegal and holdly asserted that no response to this Motion was necessary. The government's assertion violates the mandate set forth in Gelbard, and the Seventh Circuit's interpretation of the rule in Gelbard. The Seventh Circuit has never construed Gelbard as permitting no response from the government when the defendant makes a motion similar to the one at bar. For the government to suggest that they are not required to respond to Mr. Ghibaudy's motion misstates Gelbard and its progency.

The United States Supreme Court in Gelbard v. United States, 408 U.S. 41 (1972) has clearly mandated that the government must under oath affirm or deny surveillance of a witness before he can be held in contempt for failure to testify.

In the case at bar, the government neither filed an affidavit nor stated under oath the denial of any electronic surveillance. See, In Re DeMonte, 667 F.2d 590 (7th Cir. 1981). Petitioner stated in his Motion that in conversations with agents, certain questions were asked of him that indicated personal knowledge of phone calls. Furthermore, the prosecutor who was personally in charge of Mr. Ghibaudy's investigation and who had all the prior conversations with Appellant's counsel was not the attorney who was present in Court on August 23, 1984 and orally denied the surveillance. Here, the attorney for the government denying the surveillance was not the attorney in charge of the investigation; did not provide a sworn affidavit; nor at the minimum, deny the surveillance under oath. This procedure was clearly in violation of the standards set forth in the Seventh Circuit in this

Honorable Court. United States v. Gelbard, supra, In Re DeMonte, supra; Korman v. United States, 486 F.2d 926 (7th Cir. 1973).

Petitioner also requested that the government affirm or deny electronic surveillance on his attorney. Any electronic surveillance of Witness' Counsel clearly infringes on the Witness' Sixth Amendment rights and several cases have squarely held that the Sixth Amendment provides the necessary standing for a witness to make such a request for disclosure. See,. Russo v. Bryne, 490 U.S. 1219 (1972) (Douglas, Cir. J.); United States v. Alter, 482 F.2d 1016, 1026 n. 16 (9th Cir. 1973): Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); United States v. Coplon, 101 F.2d 749 (D.C. Cir. 1951)1, cert. den. 342 U.S. 926 (1952). Fourth and Sixth Amendment rights are not eliminated by a mere grant of immun-

ity. Gelbard v. United States, 408 U.S. 41, 92 S.Ct. 2357 (1972).

Further, other constitutional rights and testimonial privileges are still clearly available to an immunized witness, i.e., First Amendment, marital, and attorney client. In Gelbard, two of the witnesses were permitted to raise surveillance claims regarding their own conversations despite having received transactional immunity. In Tierney v. United States, 409 U.S. 1232, 93 S.Ct. 17 (1972), granting bail in In Re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. den., 410 U.S. 914 (1973), Justice Douglas stated that the attorney-client privilege continues especially afater "use" immunity has been granted and the fact remains that the "leads" obtained from testimony given after "use" immunity has been granted can be used to indict and convict a witness. Id. at p. 1233.

The Fifth Circuit on rehearing, In Re Tierney, 647 F.2d 512 (5th Cir. 1972), affirmed the order of the District Court ordering the Government to affirm or deny electronic surveillance on counsel for the witnesses in that case. Id. at p. 812.

The concern that the attorney-client privilege not be invaded was seen in two Supreme Court cases in which the Soliciter General discovered on appeal that attorney-client conversations had been unlawfully overheard by electronic surveillance. The Soliciter General felt duty bound to reveal that to the Court, even though certiorari had already been denied; a petitioner for rehearing was granted and the convictions were summarily reversed. Black v. United States, 386 U.S. 345 (1967). It is clear that the District Court erred in not ordering the government to at least affirm or deny electronic surveillance of Appellant

and his counsel in affidavit form during the relevant time periods, especially in light of the evidence presented of possible intercepted conversations. See, United States v. Alter, supra at p. 1024 and Beverly v. United States, supra at p. 752.

III. The Petitioner Was Deprived Of Due Process In That He Was Not Given A Contempt Hearing And Thus Was Denied A Meaningful Opportunity To Present His Defense.

The contempt statute, Title 18 U.S.C. Section 1826, grants a court the power to order the confinement of a recalcitrant witness. Although the word "summarily" is used, this authorization has never been taken seriously except maybe in the case at bar. The enactment of §1826 in 1970 has always been characterized as a cofification of existing law, both procedural and substantive, on civil contempt. See, In Re Weiss, 703 F.2d 653 (2nd Cir. 1983); United States v. Alter, 482 F.2d 1016, 1022 (9th

Cir. 1973). In Alter, the 9th Circuit concluded that:

> Section 1826(a) has no effect upon the procedural rules the Supreme Court had laid down in cases anteceding the enactment of the statute -- rules which expressly forbade summary proceedings for civil contempts.

More specifically, it is well recognized that before a witness can be imprisoned under §1826(a) he must receive adequate notice of the contempt hearing and a reasonable time and opportunity to prepare a defense. See, Gelbard v. United States, 408 U.S. 41 (1972); Groppi v. United States, 404 U.S. 496 (1972); United States v. Boe, 491 F.2d 1970 (8th Cir. 1974); United States v. Fisher, 526 F.2d 1338 (8th Cir. 1975).

The facts and circumstances surrounding the hearing at bar were clearly inadequate and violated Mr. Ghibaudy's due process rights. On the same day, he was subpoenaed

to appear before the Grand Jury, Mr. Ghibaudy was summarily held in contempt and incarcerated. Mr. Ghibaudy had requested certain discovery materials, including his previous statements to federal agents; the application to the Acting Attorney General in Washington for immunity; the affidavit affirming or denying electronic surveillance, and the transcript of his statement before the Grand Jury that day. All said materials were denied. Although the government alleges that Petitioner had plenty of time to prepare for his appearance, the government forgets that prior to Petitioner appearing on August 23, 1984, the grant of immunity was not effective and Petitioner had not filed any of his requests for discovery. The Petitioner was denied equal protection of the laws and the right to confront witnesses in a meaningful hearing. Mr. Ghibaudy believed that he had va-

lid defenses to the contempt charge and was denied any opportunity to set forth these defenses. The scope of the immunity grant is also at issue here, in that defense counsel requested a copy of the application for grant of immunity, which was not produced. This was important in that in the Justice Department's authorization and approval, the scope was more limited than the questions propounded to Mr. Ghibaudy in the Grand Jury indicated. A witness who has been immunized from prosecution in connection with grand jury proceeding involving specific offense or offenses is not impliedly immunized in respect of any inquiry to which the grand jury might thereafter address itself. Bursey v. United States, supra at p. 1060.

Contempt proceedings against a grand jury witness can and often does present complex issues of law and fact in which constitutional questions of major importance are

present. Branzburg v. Hayes, 408 U.S. 665 (1972); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). compelling need for reducing time is not shown by the fact alone that the alleged contemnor is a witness in a pending grand jury investigation; were that so then a grand jury witness would be routinely denied standard notice. The important interest of the grand jury to hear evidence without undue delay must nevertheless yield to the paramount due process right and meaningful opportunity to defend himself. In Re: Matter of Kitchen, 706 F.2d 1266 (2nd Cir. 1983); Brotherhood of Locomotive Firemen v. United States, 411 F.2d 312 (5th Cir. 1969).

The hearing Mr. Ghibaudy received was not the "uninhibited adversary hearing" contemplated by Section 1826(a). United States v. Dinsio, 468 F.2d 1392 (9th Cir. 1972). The hearing was largely confined to the

request by defense counsel for a continuance to prepare and the government stating that the legal objections raised by defense counsel were silly. (Tr. 13). Mr. Ghibaudy was not given the time to prove all possible defenses including this First, Fourth, Fifth and Sixth Amendment privileges.

The unseemly haste and impatience of the government and the District Court in the case at bar make a mockery of any rights a witness has before a Grand Jury. Surely the one or two days which defense counsel requested to prepare for a hearing after the denial of all discovery motions was not too long a delay, when the constitutional rights of an individual are involved as against the government. "The constitutional guarantee of due process of law means more than a silhouette of justice; the hearing must be at a meaningful time and in a meaningful manner.." Goldberg v. Kelley, 397 U.S. 254

(1970). A careful review of the record shows that Mr. Ghibaudy was denied any hearing at all, let alone a meaningful opportunity to present any defenses to the contempt charge.

Conclusion

WHEREFORE, the Petitioner, Randall Ghibaudy, respectfully prays this Honorable Court to grant the instant Petition for Certiorari and for such other relief as this Honorable Court deems just and proper.

Respectfully submitted,

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